United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

DEC 8 1975

75-1359

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P/S

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT OF NEW YORK

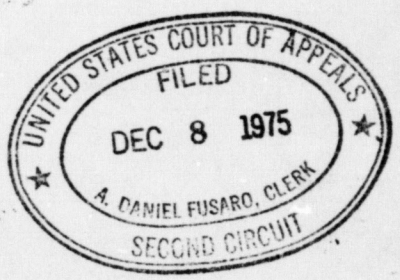
UNITED STATES OF AMERICA,

-against- T-4783

HERBERT SPERLING,

DEFENDANT-APPELLANT.

DEFENDANT-APPELLANT'S PRO SE BRIEF
ON APPEAL



DATED: This 3rd day of December, 1975.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the district court denied the appellant due process and equal protection of the laws when it refused to direct that the order granting the government's ex parte nolle prosequi of three counts be amended to read "dismissed with prejudice" where conviction on those counts had been reversed by this Court (506 F.2d 1323, 1335); the mandate of this Court issued 106 days prior to the granting of the government's motion; the appellant had repeatedly demanded a speedy retrial; and the government counsel had sworn that the appellant "will never be retried on those counts"?

PRELIMINARY STATEMENT

Herbert Sperling, the appellant herein, moved pro se on or about July, 1975, for a motion to vacate the lower court's order granting the prosecutor's ex parte application for nolle prosequi; to grant him a retrial; and/or to amend the order to read dismissed with prejudice. The government's response in opposition was submitted on or about July 26, 1975, and the appellant traversed on July, 1975. The lower court denied the appellant's motion on July 24, 1975.

Timely Notice of Appeal was submitted on August 19th, 1975, along with filing fee thereto. Docketing fee was sent to this Court on or about October 15, 1975. The certified record on appeal was docketed in this Court on October 14, 1975. A two week extension of time was duly sought via motion on November 20, 1975. Therefore, this appeal is now properly before this Court.

STATEMENT OF FACTS

The appellant, Herbert Sperling, was indicted in April of 1973 on a ten count indictment, No. 330-Cr-73, alleging violations of the narcotic laws. Thereafter a superseding indictment was returned by the Grand Jury of the Southern District of New York, No. 73-Cr-441, which carried an additional count, i.e., Section 848 of Title 21, United States Code.

Count One charged the appellant, along with twenty-seven others, with a conspiracy "to violate Sections 4705(a) and 7237(b)

of Title 26, U.S.C., and Sections 812, 841(a)(1) and 841(b)(1)(a) of Title 21, United States Code."

Count Two charged the appellant with a continuing criminal enterprise under Title 21, U.S.C., Section 848.

Counts Eight and Nine charged the appellant, along with some of the co-defendants, with distribution and possession with intent to distribute a controlled substance in July and November, 1971, respectively.

Count Ten charged the appellant, along with three other co-defendants, with distribution and possession with intent to distribute a controlled substance in December, 1971.

On the 15th day of June, 1973, jury trial commenced before Hon. Milton Pollack, District Judge for the Southern District of New York. And on July 12, 1973, the appellant was found guilty on all counts. Sentence was imposed on September 12, 1973, i.e., 30 years on Counts One, Eight, Nine and Ten, to run concurrently. Additionally, the appellant was sentenced to life imprisonment under Count Two to run concurrently with the 30 year concurrent sentences.

The Appeal.

Timely briefs on appeal were duly submitted on the above cited conviction and on October 10, 1974, this Court reversed Counts Eight, Nine and Ten, and ordered a new trial thereto (506 F.2d 1323, 1335). Counts One and Two were affirmed; however the

appellant was remanded as to Count One for reconsideration as to sentencing. The mandate of this Court issued on January 30, 1975. (See Appendix, p. 27; hereinafter referred to as "A").

Certiorari to the United States Supreme Court was sought as to the Two Counts affirmed by this Court, and on March 3, 1975, the Supreme Court declined to grant review.

Appellant's Efforts To Obtain A Prompt And Speedy Retrial On Counts Eight, Nine And Ten.

After this Court's opinion of October 10, 1974, the appellant's attorney, Raymond LaPorte, on November 15, 1974, moved for a prompt and speedy retrial to the reversed counts. (A-26). Thereafter, the appellant, having exhausted his financial resources was compelled to move pro se in applying to the lower court for a prompt and speedy retrial on the reversed substantive counts. These latter motions were never docketed. Additionally, two letters were written by the appellant requesting a speedy retrial and only one was docketed (A-28); however, the appellant retains proof that the motion and letters were sent by certified mail from the U.S. Penitentiary, in Atlanta, with copies to government counsel, return receipt requested. (A-3, 5-6, 7-8-9-10).

On May 1, 1975, the appellant submitted to this Court a pro se petition for a writ of mandamus which sought to have the Court order a speedy retrial. This Court has never acknowledged the mandamus. (A-13).

The Manner In Which The Appellant First Became Aware That The Reversed Counts Had Been Nolle Prossed.

Upon failing to receive any response from this Court, or from the lower court, the appellant initiated personal efforts to obtain a copy of the docket entry sheet. And it was upon the receipt of the docket entry sheet that he first became aware that the lower court, on May 16, 1975, granted the government's nolle prosequi as to Counts Eight, Nine and Ten. (A-29). At no time was the appellant notified as to the government's intention nor of the lower court's ultimate decision granting the ex parte application to nolle prosequi.

The Appellant's Motion To The Court Below And The Proceedings Thereto.

The appellant's motion sought vacatur of the lower court's order and to grant the appellant a retrial on Counts Eight, Nine and Ten, or in the alternative to amend the order to read dismissed with prejudice. The motion was submitted on July 3, 1975.

On July 26, 1975, the appellant received the government's affidavit in opposition which was unsworn, undated and unsigned. The face of the opposition stated in unequivocal terms that "Sperling will never be retried on those counts (8, 9 and 10)". It then proceeded to label the appellant's motion as "frivolous".

The appellant's reply to the government's opposition argued against the position taken by the government as illogical

because

> "(w)hile the defendant does not have a 'constitutional right to be prosecuted' he does, however, retain the right to seek finality of the reversed counts (8, 9 and 10) and thereby remove the threat of having untried charges hanging over his head like a Damocle's Sword. Charges that, as they presently stand, can be reactivated at the whim and fancy of any prosecutor under this or any future administration. Viewed in this light, the invocation of Constitutional protection is highly appropriate."

On July 24, 1975, the Hon. Milton Pollack, United States District Judge, denied the appellant's motion without the benefit of a written opinion. This appeal is from that order.

ARGUMENT

POINT I

DISMISSAL OF COUNTS EIGHT, NINE AND TEN WITH PREJUDICE IS REQUIRED, UNDER THE TOTALITY OF CIRCUMSTANCES, AS A MATTER OF DUE PROCESS AND/OR EQUAL PROTECTION OF THE LAW

Due process of law has been interpreted in many different ways by many different commentators, too numerous to name herein. Nevertheless, the appellant humbly submits, that due process, stripped of all its scholarly veneer, can only be reconciled with that irrefutable thin line that transcends our system of criminal procedure above that of uncivilized savages or totalitarian regimes. It is that essential ingredient inherent to a civilized society mandating fairness, notice and impartiality at every stage of a criminal proceeding. As a result the fluid contours of due process cannot, permissibly, be solidified by relegating them to a secondary stage because of the dictates of local policy.

In this light the appellant has a justiciable controversy and he now invokes his due process right to a corrective forum--which was denied to him below--and to present the unconstitutional injury complained of. For "(t)he touchstone to justiciability is injury to a legally protected right..." (Justice Burton, In The Joint Anti-Fascist Case, 341 U.S. 123, 140-141 (1959)).

In the case at bar the "injury to a legally protected right" complained of arises in the setting of Rule 6, of The Plan For Achieving Prompt Disposition Of Criminal Cases, viz.:

> "Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause." (Rules Of The U.S. Courts In New York, p. 166.11)

Which clearly has its roots firmly embedded in the Sixth Amendment command that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,..."

At this juncture the appellant admits his familiarity with this Court's position as reflected in United States V. Roemer (514 F.2d 1377) that the order/mandate does not become final until "the Supreme Court's denial of certiorari,..." (Id. at p. 1381).

Parenthetically, it should be judicially noted that although the appellant sought certiorari to the Supreme Court from this Court's affirmance of Counts One and Two, he, however, did not seek certiorari review as to the reversed counts. And in this regard the time for retrial under Rule 6 commenced to run from January 30, 1975, and not from the day that certiorari was denied--on March 3, 1975. (But see and cf. Roemer, supra, p. 1381, Ft.n. 4).

Counts Eight, Nine and Ten were ordered reversed and remanded for a new trial, by this Court, on October 10, 1974; and the mandate was issued on January 30, 1975. In the interim the appellant had submitted a pro se motion for a prompt and speedy

retrial to the reversed counts and it was never docketed. He also wrote a letter on January 21, 1975 seeking the same relief that was sought in the undocketed pro se motion. In response to the latter he received the following reply from the district court clerk, Raymond F. Burghardt, under date of January 30, 1975:

> "The mandate from the Court of Appeals was issued today. Retrial according to the Rules will be scheduled by the Judge assigned, to commence at a date prior to April 30, 1975, subject to any delay provided for by the Rules." (Emphasis added).

Hence, "(t)he relevant inquiry thus becomes whether or not the delay beyond 90 days was the result of 'good cause' within the meaning of Rule 6." (Roemer, supra, p. 1381). It is submitted to this Court that not only was no "good cause" for delay shown but that, indeed, no cause was shown at all.

Clearly, the Rules envisioned by the Plan, as well as the Speedy Trial Act of 1974, have been cavalierly set aside in the case at bar. And while it is true that this Court has ruled that "the Plan was not established primarily to safeguard defendants' rights...(but instead) to serve the public interest in the prompt adjudication of criminal cases." (United States V. Flores, 501 F.2d 1356, 1360 n.4 (2nd Cir. 1974)). It is equally true that this is a case of first impression and unlike the line of cases where this Court had occasion to hear arguments as to why the appellant(s) should not have been tried and/or retried*, here

*See e.g., United States V. Lasker, 481 F.2d 299 (2nd Cir. 1973, cert. den. 415 U.S. 975, 94 S.Ct. 1560, 39 L.Ed.2d 871 (1974); United States V. Drummond, 511 F.2d 1049 (2nd Cir. 1975).

the appellant merely seeks implementation of an already existing order of nolle prosequi by amending it to read "dismissed with prejudice". An amendment that under the totality of circumstances advanced herein is not at all frivolous--especially in view of the government's position that "Sperling will never be retried on those (nolle prossed) counts."

It is respectfully submitted to this Court that if the government has no intention of ever moving to retry the appellant on the nolle prossed counts then, surely, there is no valid justification for the lower court to decline to amend its former order to read "dismissed with prejudice". For notwithstanding the government's assertions the appellant retains the right to be free from the threat of a future prosecution that may be sought by any prosecutor in the Southern District of New York. This argument, far from being specious, is brought into sharp focus when we consider the potential danger to speedy trial concepts that are involved herein. A danger that is very real and attains crystallization when we recall that the appellant submitted timely motions for a speedy retrial months before the lower court granted the prosecutor's ex parte application to nolle prosequi.

Surely, it cannot be seriously disputed that due process of law requirements have not been activated? Nor can it be argued that consistent with due process a prosecutor may abrogate the

constitutional safeguards for a speedy trial by setting aside reversed counts, under an application of nolle prosequi in disregard of Rule 6, to be reactivated whenever the prosecutor may so desire. Such a procedure smacks of arbitrariness rather than responding to the dictates of fair play, and raises the spectre of the lack of equal protection of the law applied to the case at bar. And this latter claim finds ample support in this Court's decision in United States V. Furey (514 F.2d 1098 (2nd Cir. 1975)) where it held that the district court for the Eastern District of New York had the power and duty to dismiss an indictment "with prejudice" pursuant to Rule 4 of that court, where retrial had not been held within six months after remand.

Due process and/or equal protection requires that the appellant, a federal defendant in Manhattan, be accorded the same procedural rights enjoyed by Furey, a federal defendant in Brooklyn.

It is an unfortunate truism that within the federal judicial system an anomaly has developed known as the law of the circuit. Should federal law be further fragmented into the law of the district and then, reductio ad absurdum, into the law of the division?

Be that as it may, the rationale of Furey merely implements the speedy trial clause of the Sixth Amendment, and is consistent with the Speedy Trial Act of 1974. It is in keeping with the trend of decisions emanating from this Court and the

United States Supreme Court, requiring speedy trials or the sanctions of dismissals with prejudice.

The offenses charged in Counts Eight, Nine and Ten, are alleged to have occurred approximately three years ago. The original indictment was handed down more than two and a half years ago. The appellant was tried and convicted more than two years ago. This Court reversed and remanded more than a year ago. Since then the appellant has repeatedly moved for a speedy retrial. He has never asked for, or consented to, a continuance or dismissal without prejudice.

To reiterate; it is passing strange, indeed a paradox that government counsel files an affidavit swearing that the appellant will "never be retried" on Counts Eight, Nine and Ten, yet in the same breath opposes dismissal with prejudice?

As this Court observed in its holding in Furey, supra:

> "...(T)he defendant may suffer more from dismissal and reindictment than from one continuing indictment (albeit for a long period). Reindictment may necessitate retaining new counsel, duplication of legal and investigative effort and may occupy more of the defendant's time, all at increased cost in terms of money and psychological strain." (Id. 514 F.2d at pp. 1105-1106)

In the case at bar there is no justifiable reason to keep the Sword of Damocle's suspended over the appellant's head any longer.

CONCLUSION

It is respectfully submitted that the order appealed from should be reversed with directions to dismiss Counts Eight, Nine and Ten, "with prejudice".

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF GEORGIA)
) SS:
COUNTY OF FULTON)

HERBERT SPERLING, after being duly by law sworn, deposes and says: That on this 3 day of ~~November~~ DEC., 1975, he submitted copies of the instant papers to the Parole Officer named below for the purpose of mailing same to Paul Curran, U.S. Attorney for the Southern District of New York. All of which should constitute sufficient proof of service.

Yours etc.,

Herbert Sperling

Herbert Sperling #78271

Sworn to before me this
3 day of ~~November~~ DEC. 1975.

Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).